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Michael E. Kelly

and what the full impact of *Britt* and *Mayer* will be, of course, are still only matters of speculation. Analysis of the decisions does indicate, however, that indigent defendants are likely to face more opposition than they have faced in the past to their requests for transcripts for whatever purpose the transcripts are desired.

E. GRAHAM MCGOOGAN, JR.

Criminal Procedure—Restricting Right to Counsel at Lineups

In *Kirby v. Illinois*,[1] the United States Supreme Court confronted the problem of whether identification evidence is admissible when the accused was exhibited to identifying witnesses in the absence of counsel before he had been indicted or otherwise formally charged with a criminal offense. A sharply divided Court[2] refused to extend the sixth amendment guarantee of counsel[3] to preindictment identification confrontations. Thus *Kirby* considerably restricts the role of counsel in protection of the pretrial rights of the accused.

A brief examination of the history of the right to counsel clause is helpful in analyzing *Kirby*. Beginning with *Powell v. Alabama*,[4] the Supreme Court construed the sixth amendment guarantee to apply to "critical stages" of proceedings against an accused.[5] In *Powell*, the Court recognizes that the period from arraignment to trial was "perhaps the most critical period of the proceedings."[6] Furthermore,in *Hamilton*

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[1]92 S. Ct. 1877 (1972).

[2]Justice Stewart, joined by Justices Blackmun, Rehnquist, and Chief Justice Burger, announced the judgment of the Court. *Id.* at 1879. Chief Justice Burger filed a concurring statement on the basis that right to counsel attaches as soon as the accused is formally indicted. *Id.* at 1883. Justice Powell filed a statement concurring in the result as he would not extend the *Wade-Gilbert per se* exclusionary rule. *Id.* Justice White dissented on the basis that United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), compelled a reversal. *Id.* at 1980. Justice Brennan, joined by Justices Marshall and Douglas also dissented on the basis of *Wade* and *Gilbert*. *Id.* at 1883.

[3]U.S. CONST. amend. VI. The guarantee states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[4]287 U.S. 45, 57 (1932).

[5][T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

United States v. Wade, 388 U.S. 218, 224 (1967).

[6]287 U.S. at 57.

v. Alabama the Court stated: "What happens [at arraignment] may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted . . . ."[7] This reasoning was subsequently expanded when the Court held that a defendant's sixth amendment rights were violated by the use in evidence of incriminating statements, deliberately elicited from him by federal agents, after he had been indicted and in the absence of his counsel.[8]

In *Escobedo v. Illinois*,[9] the United States Supreme Court extended the right to counsel to an accused who had been secretly interrogated before indictment despite his repeated requests to consult with his attorney. The Court reasoned:

> The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." . . . "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' "[10]

Similarly, in *Miranda v. Arizona*,[11] the right to counsel was applied to custodial interrogations in order to protect the privilege against self-incrimination.

On the basis of these precedents and the rationale underlying them, the Supreme Court in *United States v. Wade*[12] and *Gilbert v. California*[13] held that a postindictment pretrial lineup is a critical stage

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[7]368 U.S. 52, 54 (1961). Hamilton was arraigned without counsel for a capital offense; he pleaded not guilty but was subsequently convicted and sentenced to death. The Court held that the arraignment is a "critical stage" of the criminal proceedings, and absence of counsel at this critical stage was a violation of the due process clause of the fourteenth amendment.

[8]Massiah v. United States, 377 U.S. 201 (1964).

[9]378 U.S. 478 (1964). In *Escobedo* the Court found that the police investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect. When that suspect was denied his requests to consult with his attorney and was not warned of his constitutional right to remain silent, he was denied the assistance of counsel in violation of the sixth and fourteenth amendments; and no statements extracted by the police during the interrogation could be used against him at a trial.

[10]*Id.* at 487-88.

[11]384 U.S. 436 (1966). While *Escobedo* and *Miranda* involved protection of the fifth amendment privilege against self-incrimination, those cases relied on the concept that the sixth amendment right to counsel could be required to safeguard that privilege and other specific guarantees of the Bill of Rights in order to provide a meaningful defense for the accused. *See* text accompanying notes 51-52 *infra*.

[12]388 U.S. 218 (1967).

[13]388 U.S. 263 (1967).

of the prosecution during which the accused is entitled to counsel.[14] *Gilbert* further held that any "in-court identifications" resulting from a lineup which violated this constitutional standard were inadmissible under a *per se* exclusionary rule.[15] Drawing principally upon the reasoning of *Escobedo* and *Miranda,* the *Wade* Court formulated the controlling principle for determining the necessity of counsel's presence at a lineup or any other pretrial confrontation:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[16]

The *Wade* Court distinguished lineup proceedings from mere preparatory stages in the gathering of evidence,[17] pointing out the "innumerable dangers and variables" riddling the lineup proceedings.[18] The most notable dangers cited were the well-known vagaries of eyewitness identification,[19] the victim's possible vindictive motives[20] and the inherent suggestion, whether intentional or unintentional in the manner in which the prosecutor presents the suspect to the witness.[21] The Court also recognized that a victim is unlikely to retract a pretrial identification, thus, in practical effect, determining the issue of identity before trial.[22] As in *Miranda,*[23] the *Wade* Court was concerned with the secrecy surrounding the proceedings and the inability of the defense to "reconstruct the manner and mode of lineup identification for judge or jury at trial."[24] Almost certainly, defense counsel would be unable to expose

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[14]*Id.* at 272.

[15]*Id.* at 273.

[16]388 U.S. at 227 (emphasis by the Court).

[17]*Id.* at 227-28. Compare this finding with the *Kirby* plurality's characterization of the "showup" as a part of a "routine police investigation." 92 S. Ct. at 1882.

[18]388 U.S. at 228.

[19]*Id.*

[20]*Id.* at 230.

[21]*Id.* at 229.

[22]*Id.*

[23]"Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . . ." 384 U.S. at 448.

[24]388 U.S. at 230.

possible prejudicial factors, thus depriving the accused of meaningful cross-examination of those present at the lineup.[25] Applying the established principle to these factors, the *Wade* Court concluded that the postindictment pretrial lineup was no less a critical stage of the prosecution than the trial itself.[26]

Wade and *Gilbert* were perhaps unexpected developments in the pretrial rights of criminal defendants even though the years immediately preceding those decisions had seen an expansion of those rights.[27] "The cases . . . engendered numerous academic discussions, at times passionate judicial reaction, Congressional legislation, and uncounted cases in the state and federal courts."[28] In view of the numerous dangers which were emphasized by the *Wade* Court, a number of commentators expected the lower courts to reject a preindictment—postindictment dichotomy when applying *Wade* and *Gilbert*.[29] In the years following *Wade*, the courts formulated a number of exceptions to a blanket imposition of the right to counsel at identification confrontations;[30] but, as predicted, the overwhelming majority of those courts facing the issue rejected the contention that *Wade* and *Gilbert* were to be limited only

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[25]*Id.* at 230-32.

[26]Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid of counsel . . . as at the trial itself."

Id. at 236-37 (footnote omitted).

[27]Rivers v. United States, 400 F.2d 935, 939 (1968) (footnotes omitted):

It is an understatement, of course, to say that the rights of a criminal defendant in pretrial proceedings have expanded greatly in just the last few years. But in no area of the law was the development quicker, more startling, and perhaps more unexpected than the recent decisions regarding the right to counsel during pre-trial out-of-court identification procedures and confrontations between suspects and witnesses.

[28]Comment, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830-31 (1969) (footnotes omitted).

[29]*See, e.g.*, Recent Developments, *Constitutional Law—Criminal Procedure—Application of Sixth Amendment Right to Counsel at Pretrial Identification Confrontations*, 14 VILL. L. REV. 535, 537 (1969) and materials cited at 537 n.12.

[30]*See* United State v. Ballard, 423 F.2d 127 (5th Cir. 1970) (right to counsel does not apply to confrontations involving the use of photographs of the suspect); Russell v. United States, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969) (right to counsel does not apply to on-the-scene confrontations occurring shortly after the crime); People v. Cezarz, 44 Ill. 2d 180, 255 N.E.2d 1 (1969) (right to counsel does not apply when suspect is not in custody); State v. Turner, 81 N.M. 571, 469 P.2d 720 (N.M. App. 1970) (right to counsel dos not apply to accidental confrontations, i.e., those not deliberately arranged by the police).

to postindictment confrontations.[31] However, in *Kirby v. Illinois*,[32] the United States Supreme Court refused to apply *Wade* and *Gilbert* to a preindictment identification confrontation.

Petitioner Kirby and a companion, Ralph Bean, were stopped on a Chicago street by two police officers on February 22, 1968.[33] When asked for identification, Kirby produced a wallet containing traveler's checks and a Social Security card, all bearing the name of Willie Shard. Kirby and Bean were arrested and taken to the police station, where the arresting officers learned from police records that one Willie Shard had been robbed February 20, 1968. A police car was dispatched to bring Shard to the station, where he identified Kirby and Bean at a "showup"[34] as his assailants. No attorney was present; Kirby and Bean had not asked for counsel nor had they been advised of any such right. Six weeks later, Kirby and Bean were indicted for the robbery and, upon arraignment, counsel was appointed. A pretrial motion to suppress Shard's identification testimony was denied. During his testimony,

[31]Arizona, Florida, Illinois, Missouri, and Virginia have rejected the application of the right to counsel to preindictment cases. State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969) (per curiam); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Crossman, 464 S.W.2d 36 (Mo. 1971); State v. Waters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

Thirteen states have applied *Wade* and *Gilbert* to preindictment confrontations. People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); In re Holley,—R.I.—, 268 A.2d 723 (1970); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

Every United States Court of Appeals confronting the issue has applied *Wade* and *Gilbert* to preindictment confrontations. Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); Virgin Islands v. Callwood, 440 F.2d 1206 (3rd Cir. 1971); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir. 1970); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); United States v. Broadhead, 413 .F.2d 1351 (7th Cir. 1969); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).

[32]92 S. Ct. 1877 (1972).

[33]Petitioner and Bean were stopped because the police officers thought petitioner fit the description of a man named "Hampton" wanted for an unrelated criminal offense. *Id.* at 1879 n.1.

[34]Petitioner and Bean, who were black (Brief for Petitioner at 5), were seated at a desk between two white police officers in uniform when Shard entered the room. Shard had been asked previously by the officer who brought him to the station if he had been robbed and if he could make an identification. He answered affirmatively. When he entered the room Shard saw the two defendants seated at the desk, and he pointed them out as his assailants. All of this took place several hours after the arrest. *Id.* at 1883 (Brennan, J., dissenting).

Shard described his identification of the two men at the police station and identified them again in the courtroom. Both defendants were found guilty and Kirby's conviction was affirmed on appeal.[35] In holding that Shard's testimony was admissible, the Illinois Court of Appeals relied upon an earlier decision of the Illinois Supreme Court, *People v. Palmer*,[36] which held that the *Wade-Gilbert per se* exclusionary rule was not applicable to preindictment confrontations.

In affirming the decision of the Illinois Court of Appeals, the United States Supreme Court reviewed the line of cases stemming from *Powell v. Alabama*.[37] From these cases, the plurality drew the rule that "a person's Sixth and Fourteenth amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."[38] Although they recognized that the defendant's right to counsel is not limited to assistance at trial,[39] the plurality pointed out that the cases reviewed "involved points of time at or after the initiation of adversary judicial criminal proceedings."[40] *Escobedo* and *Miranda* were distinguished as cases primarily protecting the privilege against self-incrimination, not the right to counsel as such.[41]

According to the plurality, adversary judicial criminal proceedings are initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment."[42] Only upon the initiation of such criminal proceedings does the government become an adversary committed to prosecute. Not until then is the defendant "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[43] The plurality emphasized

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[35]People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970). Bean's conviction was reversed. People v. Bean, 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970).

[36]41 Ill. 2d 571, 244 N.E.2d 173 (1969).

[37]287 U.S. 45 (1932).

[38]Kirby v. Illinois, 92 S. Ct. 1877, 1881 (1972).

[39]"[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Id. at 1882 n.6, *quoting* Powell v. Alabama, 287 U.S. 45, 57 (1932).

[40]92 S. Ct. at 1882.

[41]"[T]he 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination.' " *Id.*

[42]*Id.*

[43]*Id.*

that the situation in *Kirby* was only "a routine police investigation" until the commencement of the " 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[44]

In reaching the decision in *Kirby*, the plurality asserted that they declined to depart from the rationale of *Wade* and *Gilbert* that "an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a postindictment lineup is such a 'critical stage.' "[45] Yet, as noted above,[46] a great majority of the lower courts found the reasoning of *Wade* equally applicable to preindictment identification confrontations.[47] A number of the opinions point out that the real concern of the *Wade* Court was the danger of suggestiveness and the difficulty in recreating the facts of the confrontation at trial which would hamper effective cross-examination.[48] Particularly instructive are the statements of the Tenth Circuit in *Wilson v. Gaffney*:[49]

> Although the many potential ramifications of the *Wade-Gilbert* rule remain to be judicially explored we consider it certain that the rationale of the cases extends beyond the particular facts of those cases . . . . [S]urely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. The confrontation of a lineup, said to be "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," cannot have a constitutional distinction based upon the lodging of a formal charge. Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere.

The *Kirby* plurality's attempt to distinguish *Escobedo* and *Miranda* as cases primarily protecting the fifth amendment privilege against compulsory self-incrimination is also difficult to reconcile with the reasoning

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[44] *Id.*

[45] *Id.* at 1883 (emphasis by the Court).

[46] *See* note 31 *supra.*

[47] *See, e.g.*, Long v. United States, 424 F.2d 799, 802 (D.C. Cir. 1969): "Although *Wade* arose in the context of a formal post-indictment line-up, we find its requirement of counsel equally applicable to the informal, pre-arrest confrontation of appellant which took place in the squad room."

[48] "We characterized in *Long* the Supreme Court's rationale in *Wade* to be that of the difficulty attendant upon accurately reconstructing the exact circumstances of the pretrial confrontation and the useful role which counsel can play not only in that process but in suggesting procedures which might render the confrontation legally unassailable thereafter." United States v. Greene, 429 F.2d 193, 196 (D.C. Cir. 1970).

[49] 454 F.2d 142, 144 (10th Cir. 1972) (footnote omitted).

of *Wade*. In *Rivers v. United States*,[50] the Fifth Circuit asserted that "with *Miranda* on the books, it is indisputable that most, perhaps all, confrontations occurring after arrest will fall within the rules announced in *Wade* and *Gilbert*." The *Wade* Court recognized that "nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights."[51] Instead, *Wade* declared, *Escobedo* and *Miranda* reaffirmed the principle "that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[52]

The questionable logic of the plurality opinion in *Kirby* is further underscored when one analyzes the particular confrontation involved.[53] A showup has been described as "the most grossly suggestive identification procedure now or ever used by the police,"[54] yet the identification confrontation in *Kirby* was characterized as no more than part of a routine police investigation.

It should be logically apparent that those factors which make a pretrial lineup a critical stage of the prosecution exist at a preindictment as well as a postindictment identification confrontation.[55] The investigation in *Kirby* already had focused upon particular suspects in the custody of the police. The circumstances surrounding the confrontaton would seem to indicate to the witness that the police believed that Kirby and Bean were the guilty parties. Had counsel been present, he could have at least requested that Kirby and Bean be exhibited to the witness in an identification parade where the witness would have been required to identify each man individually.[56] As it was, the issue of identity was

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[50]400 F.2d 935, 939 (5th Cir. 1968).

[51]388 U.S. at 226.

[52]*Id.*

[53]For a description of the identification confrontation in *Kirby see* note 34 *supra*. "In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers." 92 S. Ct. at 1887 (Brennan, J., dissenting).

[54]P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 28 (1965).

[55]In Escobedo v. Illinois, 378U.S. 478 (1964), the State argued that Escobedo had no right to call his attorney prior to an in-custody interrogation since he was not formally indicted. The Court stated: "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486.

[56]"The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967).

determined before trial[57] without counsel's protective presence.[58]

The *Wade* Court attempted to assure a meaningful defense for the accused.[59] In contrast, the plurality in *Kirby* emphasized "the interest of society in the prompt and purposeful investigation of an unsolved crime."[60] By limiting the right to counsel to postindictment confrontatons, the *Kirby* holding may considerably dampen further expansion of the protection by counsel of the criminal defendant's pretrial rights. Protection of those rights is now, for the most part, dependent on the guarantees of procedural due process embodied in the fifth and fourteenth amendments.[61] It would seem that the role of counsel, before the initiation of formal judicial proceedings, is to be limited to the *Escobedo-Miranda* situations where the privilege against self-incrimination is endangered.[62] More importantly, the rationale underly-

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[57]On direct examination, Shard identified Kirby and Bean as the pair he saw in the police station squad room, not as the alleged robbers on trial in the courtroom. 92 S. Ct. at 1888 (Brennan, J., dissenting).

[58]Some commentators have argued that counsel may serve no significant purpose at a lineup other than that of a witness or observer; that the police, and not counsel, are in charge of the identification procedure. *See* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A.L. REV. 339 (1969); Note, *Right to Counsel at Pre-trial Lineup*, 63 NW. U.L. REV. 251 (1968); Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967).

However, one can argue that there is no reason to assume that the police will be uncooperative with counsel and ignore his suggestions as a general rule. His role and effectiveness may not be so limited as some commentators suggest. *See, e.g.*, Recent Developments, 14 VILL. L. REV., *supra* note 29, at 541:

> [H]is presence at the initial confrontation between the witness and the suspect does afford him a greater capacity to effectively cross-examine the identifying witnesses at trial. Since in-court identifications are normally the highpoint of a criminal trial, any information obtained at a pretrial confrontation which can be used to shake the credibility of an identifying witness is invaluable to the defense. Moreover, if the suspect was unaware of the unfairness of the initial identification procedure, or chooses not to testify because of a prior criminal record, counsel is available to testify in his behalf.

[59]"The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.' " 388 U.S. at 224-25.

[60]92 S. Ct. at 1883.

[61]What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution . . . . The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification.

Id.

Whether or not there was a deprivation of due process in the particular circumstances of *Kirby* was not considered in view of the limited grant of certiorari. That question was left open for inquiry in a federal habeas corpus proceeding. *Id.* at 1883 n.8.

[62]Both *Kirby* and *Wade* held that the constitutional privilege against compulsory self-incrimination was in no way implicated in the particular identification proceedings before the Court. *Id.* at 1881.

ing *Escobedo* and *Miranda* was not afforded even a cursory examination by the plurality. Yet, *Wade* specifically relied upon those decisions in establishing the controlling constitutional principle[63] for the applicability of the sixth amendment guarantee of the right to counsel at pretrial confrontations.[64] Apparently that guiding principle has now been rejected. In its place, *Kirby* has established an illogical, inflexible formula based on a preindictment-postindictment dichotomy, a formula severely limiting counsel's role in pretrial proceedings in the future.

MICHAEL E. KELLY

Federal Jurisdiction—Citizenship of the Beneficiary Controls in Wrongful Death Actions Requiring a Resident Administrator

Administrators have traditionally been viewed as the real party in interest whose citizenship is determinative in diversity jurisdiction. In a recent wrongful death action, *Miller v. Perry*,[1] the Court of Appeals for the Fourth Circuit sustained the validity of state statutes requiring such actions to be brought by a resident administrator, but held that the citizenship of the beneficiaries controls diversity.

In *Miller*, a minor citizen of Florida had died in North Carolina, allegedly through the negligence of the Perrys, North Carolina citizens. Since the minor died intestate, his father was appointed administrator of his estate in Florida. Mr. Miller subsequently brought an action in his representative capacity against the Perrys in a federal district court in North Carolina under the state's wrongful death act.[2] This action was dismissed because North Carolina law requires in-state assets to be administered by a resident administrator.[3] The state supreme court had previously held that a wrongful death action was an asset of the deceased in the county where the death occurred.[4] The decedent's grandfather, a resident of North Carolina, was then appointed ancillary administrator, and a second action was brought by him in the district court

[63] *See* text accompanying note 16 *supra*.

[64] 92 S. Ct. at 1884 n.2 (Brennan, J., dissenting).

[1] 456 F.2d 63 (4th Cir. 1972).

[2] N.C. GEN. STAT. § 28-173 (1966). For the provision itself, *see* note 34 *infra*.

[3] N.C. GEN. STAT. § 28-8 (1966) provides in pertinent part: "The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—. . . (2) Is a nonresident of this State; but a nonresident may qualify as executor."

[4] Vance v. Southern Ry., 138 N.C. 460, 50 S.E. 860 (1905).